No. 3754

In the

United States Circuit Court of Appeals

For the Ninth Circuit

AUGUST BECHTOLD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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There is no assignment of errors filed in this cause, and it is therefore submitted that there is nothing before the court for review. The habeas corpus proceeding is a collateral attack upon the judgment of the court entered on the conviction of Bechtold for the violation of Sections 3258, 3281 and 3282 of the Revised Statutes. The record does not disclose that a motion to quash the indictment was interposed, or a demurrer filed, or a motion made in arrest of judgment, so that the judgment is first attacked by the petition for the writ of habeas corpus.

The court below had jurisdiction of the offense and of the person of the accused, and despite the contention of the appellant that the three sections of the Revised Statutes above referred to "are clearly inconsistent with the provisions of the Volstead Act and the Eighteenth Amendment to the Constitution, and are superseded by them," nevertheless, this appeal comes within the rule laid down in the case of Hopkins v. M'Claughry, 209 Fed. 821, (C. C. A. 8th), in which case one Hopkins, who was confined in the United States Penitentiary at Leavenworth, Kansas, on conviction and sentence for embezzlement and abstraction, under Sec. 5209 of the Revised Statutes, instituted a habeas corpus proceeding before the United States District Court of Kansas to secure his release, claiming that his imprisonment was unlawful, because the indictment was fatally defective. The court in the course of the opinion said:

> "Without intimating that the indictment was in any wise defective, it must be remembered that this is a collateral rather than a direct attack. In re Frederich, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631. No objection was ever made to the indictment in any way in the District Court for the northern District of Ohio, Eastern Division, when it was returned, the petitioner arraigned, pleaded guilty, and was sentenced. The indictment is first assailed on this collateral attack."

And, the Court quoted from Ex parte Yarbrough,

110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, as follows:

> "Whether the indictment sets forth, in comprehensive terms, the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction. Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but, if so, it is an error of law, made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of habeas corpus limited to an inquiry into the existence of jurisdiction on the part of the court."

And, from Re. Coy, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274:

> "In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court, which tried the prisoner, with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus."

And also from the case of Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110:

> "It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. We are not by any means prepared to ad-

judge that the indictment did not properly charge an offense in both the first and fourth counts. See Dimmick v. United States, 116 Fed. 825 (54 C. C. A. 329), involving this indictment, where it is set forth. It is not, however, necessary in this case to decide the point for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reexamined on habeas corpus. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be re-examined on habeas corpus."

The court in the case at bar was acting within its jurisdiction in determining that the Volstead Act repealed sections 3258, 3281 and 3282 of the Revised Statutes only to a limited degree. It will be conceded however, that the lower court had jurisdiction to try and punish for the offense sought to be set forth in the indictment, no matter whether the offense be held to be in violation of the Internal Revenue Laws or of the National Prohibition Act. Hence, applying the principle laid down in Dimmick v. Tompkins, supra, if the lower court "erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be re-examined on habeas corpus. The

writ cannot be made to do the office of a writ of error."

The decision of the Supreme Court in the case of United States v. Yuginovich, 41 Sup. Ct. 551, lends no aid to the appellant, for that case merely holds that certain sections of the Revised Statutes are partially repealed by the National Prohibition Act; two of the sections of the Revised Statutes involved in that case being involved here, viz., sections 3281 and 3282.

In the Yuginovich case the indictment was construed by the lower court "upon the assumption that the charges had relation to *intoxicating liquors intended for beverage purposes.*" and that view was followed by the Supreme Court. Whether or not the language of the indictment in that case justified the assumption, is beside the question, because in the case at bar no mention whatsoever is made in the indictment, nor can the language therein be construed to mean that the pleader intended to refer to *"intoxicating liquor for beverage purposes."*

The first count of the indictment in the case at bar charges Bechtold with making and fermenting a certain mash fit for the production of spirits in a certain building other than a distillery, duly authorized according to law, and on premises other than a distillery, duly authorized according to law.

The second count charges that Bechtold failed and neglected to register with the Collector of Internal Revenue a still which he had in his possession and under his control which still was set up.

The third count charges him with carrying on the business of a distiller without having given the bond required by law.

It will be observed that there is not a single reference in any of these counts to "intoxicating liquors intended for beverage purposes." Hence, the Yuginovich case has no application to the case at bar, even though it should be held that the habeas corpus proceeding is not a collateral attack upon the judgment herein.

Resuming, it is respectfully submitted that this appeal should not be considered because the transcript contains no assignment of errors, and that the judgment should be affirmed, because,

First, the habeas corpus proceeding is a collateral attack upon the judgment, and

Second, the indictment states facts sufficient to constitute a public offense under sections 3258, 3281 and 3282 of the Revised Statutes, which are unaffected by the National Prohibition Act, and are otherwise not repealed.

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